FRONT Report LINE

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SENATE BILL 335

Nixon opposes reducing time

Bill would reduce punishment for several crimes

ATTORNEY GENERAL Jay Nixon announced his opposition to a bill that he said would put society at risk by reducing the punishment for a broad class of crimes, including weapons offenses, DWI felonies and meth crimes.

Nixon sent a letter to state lawmakers in early March, urging them to reject Senate Bill 335.

He said lawmakers' efforts to avoid overcrowding in prisons would sacrifice the priority placed on safety and fighting crime.

The bill's provisions include:

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- Reduction in the maximum imprisonment from five years to four years for all class D felonies, including DWI felonies.
- Elimination of mandatory imprisonment for those convicted of armed criminal action. If passed, those convicted could receive probation.
- Reduction in the punishment for drug offenses, including convictions involving meth. The board of probation and parole could alter certain sentences imposed by judges for drug crimes.
- Elimination of all jury involvement in criminal sentencing, except in capital cases. A jury now has a significant role in setting punishments for convictions.

"Missouri has made great progress in recent years in correcting the perception that our prison system simply is a revolving door," Nixon said. "I am convinced the current reduction in crime is directly related to the fact that many criminals are no longer on our streets."

SUV cargo search ruled legal

THE 10th U.S. CIRCUIT COURT of Appeals ruled on Feb. 19 that the cargo area of a sports utility vehicle or hatchback, even when covered, can be thoroughly searched following a full custodial arrest.

In *U.S. v. Olgvin-Rivera*, police arrested the driver of an Isuzu Rodeo for not having a drivers license. They thoroughly searched the vinyl-covered cargo area and found 118 pounds of marijuana.

A custodial arrest allows officers to thoroughly search the suspect and the entire **interior** of the vehicle the arrestee occupied. This search incident to arrest does not, however, authorize a search of the trunk.

The Isuzu had a retractable vinyl cover that operated like a window shade over the rear cargo area. The defendant claimed this area was equivalent to a car trunk and was "off limits" to a search incident to arrest. The police argued this area was considered a car interior and searchable.

The court held that a driver will not be allowed to make an area normally available to a search "off limits" simply by covering it. This search was lawful. Because a passenger could reach the area from inside the vehicle, it is considered the interior for purposes of a search incident to arrest.

The court essentially compared the SUV to a station wagon.

Drunken driving conviction reversed

1996 law restricts DWI cases

A 1996 STATE law that redefined "driving" is making it harder to prosecute some DWI cases, including a 1998 case in which a DWI conviction was reversed.

As reported in Front Line in October 1996, being in "physical control" of a vehicle no longer constitutes "driving" when charging a suspect with DWI.

This revision restricts DWI prosecutions to cases in which the state can prove beyond a reasonable doubt that the suspect actually drove the

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Crime legislation update

Several issues that would affect law enforcement are being debated in the General Assembly:

REGISTRATION OF SEX OFFENDERS

HB 788 requires the Department of Public Safety to post sex offender information on a Web site. It also requires sex offenders to register in the counties where they work, attend school or reside for 10 or more days per year. The bill prohibits probation or parole for any sex offender unless registration is a condition of probation.

Bill status: Passed House.

REGISTRATION OF JUVENILE SEX OFFENDERS

HB 348 requires a juvenile who has been adjudicated for a sexual offense that, if committed by an adult, would be a felony to register with the juvenile office in the county where the juvenile lives. Registration information would be available to law enforcement, prosecuting attorneys and school officials but not to the general public.

Status: Voted out of Senate Criminal Law Committee.

UNLAWFUL USE OF WEAPONS

HB 658 increases the penalty for carrying a firearm onto school grounds or a school bus from a class B misdemeanor to a class C felony.

Status: Voted out of House Public Safety and Law Enforcement Committee on March 9.

PENALTIES FOR SEX OFFENDERS

HBs 850 and 851 correct a minor change in a 1995 sex-crime law that redefined "sodomy" and, coupled with a 1939 law, is now shaving decades off the sentences of several child molesters.

Section 1.160 would be revised so that an offender's sentence would not be affected by later amended laws.

In 1995, legislators redefined sodomy to remove fondling without penetration and reclassified that offense as child molestation, which carries a much lighter sentence.

Those convicted of sodomy for fondling before the law took effect in 1995, but not sentenced until after, took advantage of the 1939 law, Section 1.160, to get their sentences reduced. That law says criminals not yet sentenced should receive the benefit of reduced sentences in new laws.

Status: Perfected by House.

MISCELLANEOUS PROVISIONS

HB 283 incorporates 13 bills filed earlier this session. Among its provisions:

- Extends the detention time without a warrant from 20 to 48 hours for certain serious crimes;
- Makes it a class D felony to steal between $150 and $750 (it now is a class A misdemeanor);
- Creates crime of leaving the scene of an accident in the case of a witness;
- Specifies that a court may order restitution be paid to a county law enforcement fund.

Status: Voted out of House Criminal Law Committee.

Court: Prosecutors can use pre-Miranda confession

A FEDERAL APPEALS court recently ruled that despite the U.S. Supreme Court's landmark 1966 Miranda ruling, prosecutors can use a confession from a suspect who reveals information before he has been read his rights.

In a 2-1 ruling Feb. 8, a panel of the 4th U.S. Circuit Court of Appeals said a 1968 federal law on voluntary confessions takes precedence over the 1966 Miranda ruling in federal cases.

Since the Miranda ruling, failure to recite the warning most often resulted in valuable evidence — a confession or incriminating statement — being lost to prosecutors.

The 1968 law, however, said such confessions can be used if federal judges are sure the suspects' statements were voluntary. For years, however, the U.S. Justice Department has declined to rely on the 1968 law during appeals. In a letter to Congress two years ago, Attorney General Janet Reno called it unconstitutional.

The 4th Circuit ruled that a man's confession to FBI agents that he had robbed a bank was admissible. The robber said his 1997 statement was given before he was told of his rights to remain silent and see a lawyer. A lower court had thrown out the confession.

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UPDATE: CASE LAW

EASTERN DISTRICT

State v. Daryl L. Davis

No. 73928
Mo. App., E.D., Dec. 22, 1998

The court reversed and remanded for the admission of further evidence because the trial court erred in denying a defendant's motion to suppress evidence and in admitting into evidence items seized during an investigatory stop, search and arrest.

The limited *Terry* patdown search exceeded the scope of the defendant's detention because the purpose of this limited search is not to discover crime evidence but to allow the officer to investigate without fear of violence.

The state failed to introduce any evidence that the police believed from a patdown that the defendant had weapons or contraband in his pockets.

Evidence of receiving stolen property was discovered before the patdown, but was seized as part of the defendant's arrest when marijuana was discovered. The officer did not testify that he thought the defendant was armed when he searched. Thus, the court remanded for further evidence.

State v. Michael Crump

No. 73745
Mo. App., E.D., Jan. 12, 1999

The court reversed and remanded the defendant's conviction of possession of a controlled substance with intent to distribute, deliver or sell near an elementary or secondary school pursuant to Section 195.214.

While the state conceded that it erred in charging the defendant with violating Section 195.214 because there was no evidence that the defendant distributed or delivered controlled substances within 2,000 feet of a school, the state presented sufficient evidence of the defendant's guilt of Section 195.211 by unlawfully possessing a controlled substance with the intent to distribute or deliver.

Proof that the defendant possessed with the intent to distribute or deliver was sufficient for the jury to find him guilty of the class B felony described in Section 195.211; the trial evidence established all elements of this felony and the jury necessarily found these elements in arriving at its verdict.

Accordingly, resentencing, not discharge, was the proper remedy.

WESTERN DISTRICT

State v. Filiberto L. Rodriguez Jr.

No. 54756
Mo. App., W.D., Dec. 15, 1998

The court reversed and remanded for a new trial because the state failed to disclose to the defense that a defense witness recanted his deposition testimony to prosecutors two days before trial and informed them of the changes in the story. At trial, the defense called the witness who recanted his story on the stand.

The court first found that this evidence was not discoverable under *Brady v. Maryland* because it was not exculpatory. While the state was not technically required to disclose this recantation under Supreme Court Rule 25.03, the court found that the failure to disclose violated the spirit of the rule and required a mistrial.

Relying on this witness's deposition testimony, the defense counsel's strategy centered on the witness testifying that the marijuana at issue belonged to him, and not the defendant.

If information about the changed testimony had been disclosed, even the day before trial, the defendant could have requested a continuance to form a proper defense, or change his strategy. Instead, the prosecutor remained silent.

The state's failure to disclose that the defendant's prime witness was totally recanting his deposition testimony violates the spirit of the rules of criminal discovery. It also denied the defendant a fair trial.

A motion for rehearing is pending in the Western District.

State v. William Butler

No. 55192
Mo. App., W.D., Dec. 29, 1998

The court reversed and remanded for a new trial based on the admission of other crime evidence that the court found was more prejudicial than probative.

The state's reference to the defendant's incarceration, the victim bonding him out of jail and his court date did not have a legitimate tendency to prove that the defendant committed the crime of unlawful use of a weapon and three counts of third-degree assault.

The state emphasized the defendant's jail stay and the need to be bonded out by repeatedly asking witnesses about it. These questions alerted the jury that the defendant had been arrested before, was out on bond, and had failed to appear for a court date.

These references, coupled with the victim's testimony that the defendant threatened to kill her "like the no-good bitch he killed before," significantly prejudiced the defendant.

The state contended that evidence of the threat was probative of the charge of unlawful use of a weapon by exhibiting because the defendant knowingly exhibited weapons capable of readily

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UPDATE: CASE LAW

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lethal use in an angry and threatening manner and that it showed the complete picture of the crime.

While the court agreed with the state's contentions, it concluded that the evidence was more prejudicial than probative. Given the repeated references and the prosecutor's questions emphasizing the references, a reasonable probability existed that the improper evidence influenced the jury's verdict.

State v. Elroy Willis

No. 54550

Mo. App., W.D., Jan. 5, 1999

The court reversed and remanded for a new trial the defendant's conviction of involuntary manslaughter because the trial court abused its discretion in permitting the state to use two letters the defendant wrote to his wife from prison in violation of Rule 25.03(a)(2).

The state failed to disclose until the day of trial two letters written to the victim's mother, his wife, in which he said he was sorry for dropping their baby but that it had been an accident.

Rule 25.03 requires disclosure of any written or recorded statements and the substance of any oral statements made by a defendant or co-defendant.

At the prehearing motion to suppress statements, the defendant testified he made up the story about dropping the baby to protect his wife. The prosecutor then produced the letters and cross-examined him. On cross-examination at trial, the prosecutor again used the letters.

The court found that the defendant was prejudiced because the defense already had been prepared within two days of trial.

Although the defendant never requested a continuance because of the late disclosure, failure to ask for the continuance did not affect whether the state's discovery violation was fundamentally unfair to the defendant. The letters were not cumulative and contradicted the core of the defense.

There also was a reasonable likelihood that the letters could have affected the trial outcome because they were a substantial part of the state's case — the prosecutor made a skilled and artful use of the letters on cross-examination, and made substantial use of the letters in closing argument.

Also, the jurors found the letters to be important. They sent a note to the judge requesting to look at the letters.

SOUTHERN DISTRICT

State v. Lynn C. Reinschmidt

No. 22105

Mo. App., S.D., Dec. 17, 1998

The court erred in declining to disqualify the Greene County Prosecuting Attorney's Office due to a conflict of interest — an assistant prosecutor had served as the defendant's public defender on the same case.

The public defendant-turned-assistant prosecutor submitted an affidavit stating she was in not involved in prosecuting the appellant's case and she had not disclosed any confidential information.

Under *State v. Ross*, 829 S.W2d 948 (Mo.banc, 1992), the court should have disqualified the prosecutor's office.

The attorney was the appellant's criminal defense lawyer for more than two years on the case before she joined the prosecuting attorney's office. Her contact with him was neither casual nor brief. She had the opportunity to gain confidential information that could aid the prosecution.

Although she submitted an affidavit swearing she did not disclose confidential information, the situation "create[d] such suspicions and appearance of impropriety," that prejudice is presumed subject to rebuttal.

Elizabeth Ziegler, director of the Missouri Office of Prosecution Services, prepares the Case Law summaries.

Child-abuse investigation school set for May

The Missouri Office of Prosecution Services is conducting a seminar on child-abuse investigation May 19-21 at Tan-Tar-A Resort in Osage Beach.

The National Center for Prosecution of Child Abuse is co-sponsoring the three-day seminar, which is developed for prosecutors and police investigators.

Nationally recognized experts in child-abuse investigation will make presentations. The seminar is POST-accredited.

The registration fee is $40 and the resort's room rate is $70. For more information, contact Bev Case at MOPS at 573-751-0619.

ACTION: AG'S OFFICE

Meth conviction won

The Meth Prosecution Strike Force obtained a felony conviction against a Hickory County man for making meth.

Larry Box, who has a prior meth conviction, faces a class A felony. Box was arrested along with his brother, Edgar Box, and two other men for the same crime of manufacturing meth. All are from Hickory County.

The Strike Force also obtained a guilty plea from a New Madrid County man for meth possession. The Strike Force is working on 90 cases.

Deputy, jailers arrested

A Miller County deputy sheriff and six former jailers face charges ranging from acceding to corruption to sexual assault following an investigation by the AG's Office, patrol and FBI.

The six men and one woman are accused of taking cash in exchange for conjugal visits between inmates and spouses, smuggling alcohol and marijuana into the jail, and getting inmates to exchange sex acts for special treatment or medicine.

The latest allegation came March 23 when Deputy Larry Young was charged with sexual assault, acceding to corruption and failing to serve an arrest warrant. A preliminary hearing is April 8.

Violent sexual predator law used for first time

The AG's Office filed to commit three men into the custody of the Department of Mental Health, following their release from prison

The men had been convicted in Boone, Laclede and Greene counties for sex crimes.

The violent sexual predator law, which took effect Jan. 1, allows the state to retain custody of a sexual predator determined to have a mental abnormality making the person likely to commit more predatory sex acts. If a determination is made, the defendant is committed until considered safe.

2 executed, 2 wait

Two inmates were executed this year with two others facing deaths on April 14 and April 28.

- James Rodden was executed for killing Terry Trunnel in Marshall in 1983.
- Roy Roberts was executed for the 1983 murder of a Moberly corrections officer. Roberts held Thomas Jackson while two other inmates stabbed him.
- Roy Ramsey Jr. is to be executed for murdering Garnett and Betty Ledford of Grandview in 1988.
- Ralph Davis is to be executed for murdering his wife. Susan Davis of Columbia disappeared in June 1986. Her car was found in March 1988 in a storage unit rented by Davis.

COURT CASES

"Perp walk" creates liability

A federal court ruled that New York City police violated the civil rights of a suspect "paraded" before the media for a photo opportunity.

A TV station asked police to bring out the doorman, arrested for burglarizing in his building, for a "perp walk." The handcuffed suspect was driven around the block and returned to the station. The action was deemed an unreasonable seizure violating the Fourth Amendment — it served no legitimate purpose and unreasonably humiliated.

In a related matter, the U.S. Supreme Court heard arguments on March 24 about the constitutionality of officers allowing the media to accompany them to execute search warrants.

Court opines on notice of seizure

The U.S. Supreme Court on Jan. 13 ruled that when police seize property for a criminal investigation, they are not required to notify the owners or possessors of the property about state law remedies to regain possession if those remedies are established by published and generally available state statutes or case law.

In *City of West Covina v. Perkins*, the owners argued that the due process clause of the U.S. Constitution requires officers to notify owners of their legal remedies. Officers only had left notice of the seizure along with an inventory.

The procedure and options to retain possession are similar to those used in Missouri.

Gun makers liable

A federal jury found several gun makers liable Feb. 11 in three of seven New York City-area shootings because of negligent marketing practices. Damages of $560,000 were awarded to the sole survivor, a teen who was seriously wounded. He and relatives of six homicide victims sued the industry for negligently marketing a legal product, the first case of its kind against gun makers.

New book for crime victims

The AG's Office has revised its Crime Victims' Rights book to include more information for victims about the criminal justice system. The book includes a section about victims' guaranteed notification rights and participation in the criminal justice system.

Copies will be mailed to prosecutors, sheriffs and police chiefs in late April. Crime Victims' Rights Week is April 25 to May 1.

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DRIVING

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vehicle, not just that he was in physical control.

In *State v. Hughes*, 978 S.W.2d 24 (Mo. App., WD, 1998), a responding officer found that the defendant's car had hit a tree. The engine was still warm and there was a crack in the windshield consistent with the driver's head striking it. Also, the defendant's wallet was found in the front seat.

The officer found the defendant one block from the accident with a fresh cut on his forehead, of which he was unaware. The defendant then admitted the car was his, but said his girlfriend had been driving. The defendant had blood-shot eyes, slurred speech, smelled strongly of alcohol and staggered. He was arrested and refused to submit to a breath test.

The appeals court reversed the conviction because the state did not present sufficient evidence that the defendant was driving. While acknowledging that an officer need not see the defendant drive the vehicle, and that the state can prove "driving" with circumstantial evidence, the court held that there simply was not sufficient evidence to prove he was driving.

Often, an officer will ask a defendant if he was driving and get an admission. That evidence is highly relevant and sufficient to prove he was "driving." This defendant, however, denied he was driving.

St. Louis police defend taking photos at funeral

THE ST. LOUIS COUNTY Police Department successfully defended a civil rights lawsuit filed by the mother of a suicide victim whose body was photographed at the funeral by police.

In *Riley v. St. Louis County*, 153 F.3d 627 (8th Cir. 1998), the mother claimed that her rights were violated when officers took pictures of the funeral and the deceased in his coffin.

The 18-year-old's suicide was believed to have been related to gang activity and the mother claimed that the police took and used these pictures in public forums to discuss gangs.

The court held that no constitutional invasion of privacy or any other constitutional violation occurred.